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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JOEL PRICE HAGGARD, Petitioner.	2 CA-CR 2010-0307-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR37068

Honorable Ted B. Borek, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
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Joel Haggard
Tucson
In Propria Persona

E C K E R S T R O M, Judge.

¶1 Petitioner Joel Haggard seeks review of the trial court's order summarily denying his successive petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. In 1992, Haggard was tried by a jury and convicted of two counts of child

molestation. He was sentenced to a presumptive term of seventeen years for the first offense and, pursuant to sentencing provisions in force when he committed his offenses, an enhanced, presumptive term of twenty-eight years for the second offense, to be served consecutively to the first term. *See* 1990 Ariz. Sess. Laws, ch. 384, § 4; 1987 Ariz. Sess. Laws, ch. 307, §§ 3-4; *State v. Hannah*, 126 Ariz. 575, 576-77, 617 P.2d 527, 528-29 (1980) (under former A.R.S. § 13-604(H), defendant subject to sentence enhancement for "prior conviction[]" when convicted of "successive but separate crimes" in single trial). We affirmed his convictions and sentences on appeal, rejecting his claims that the court had erred in precluding expert testimony about his diminished mental capacity and that his sentence was disproportionately harsh, in violation of the Eighth Amendment. *See State v. Haggard*, No. 2 CA-CR 92-1060 (memorandum decision filed Dec. 28, 1993).

¶2 In his first Rule 32 petition for post-conviction relief, Haggard maintained the trial court had fundamentally erred in admitting the victim's prior consistent statements and had improperly enhanced his sentence under the rule announced in *Hannah*. Although the trial court addressed the merits of these claims, on review, we held they were precluded pursuant to Rule 32.2(a), noting, "The[se] issues could have been raised on appeal but were not and were, therefore, waived." *State v. Haggard*, No. 2 CA-CR 96-0540-PR (memorandum decision filed May 1, 1997).

¶3 The trial court dismissed Haggard's second Rule 32 proceeding, apparently after appointed counsel notified the court that she had reviewed the record and found no non-precluded claims for post-conviction relief. On review, we declined counsel's request that we "search the entire record for error." *State v. Haggard*, No. 2 CA-CR 97-

0165-PR (memorandum decision filed Dec. 23, 1997); *cf. State v. Smith*, 184 Ariz. 456, 459, 910 P.2d 1, 4 (1996) ("[N]o court rule provides for fundamental error review of a petition for review to the appellate courts . . . .").

¶4 In his most recent successive petition for post-conviction relief, Haggard argued his conviction and sentence for the second count of molestation should be vacated because the events giving rise to the separate counts "happen[e]d the same day, the same hour, [and] within a 100 yard radius" of each other. Without specific citation, he maintained "new sentencing guidelines" enacted "since [his] last [R]ule 32 [proceeding] affect this case" and appeared to argue his convictions were inconsistent with "other court rulings that sexual conduct over a three month period was all one count." The trial court summarily denied relief, finding Haggard's claims were precluded. According to the court, Haggard had "show[n] no reason why the 'new sentencing guidelines' should be applied retroactively." Haggard filed a motion for reconsideration, which the court denied, and this pro se petition for review followed.

¶5 On review, Haggard argues, as he did below, that he should have been charged and convicted of only one count of child molestation or, alternatively, that the trial court erred in sentencing him to an enhanced, consecutive term of imprisonment for his conviction on a second count of molestation. Essentially, he asserts his convictions or sentences were in error because the two counts of molestation "all happened from one and the same crime." We review the court's summary denial of post-conviction relief for an abuse of discretion. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here.

¶6 Like the issues he raised in his first Rule 32 petition, Haggard's claims are precluded because they could have been raised on appeal, but were not. *See* Ariz. R. Crim. P. 32.2(a)(3) (claim precluded if waived at trial, on appeal, or in previous collateral proceeding). Haggard appears to argue his claims are based on recent changes in the law and so fall within an exception to the general rule of preclusion. But, although Rule 32.2(b) recognizes an exception to preclusion for claims based on "a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence," Ariz. R. Crim. P. 32.1(g), Haggard is mistaken that his claims fall within that exception.

¶7 To the extent Haggard contends "new sentencing guidelines" enacted after he was convicted affect the sentences he received, we agree with the trial court that legislative revisions of sentencing statutes are not changes in the law that apply retroactively to Haggard's case. "A basic principle of criminal law requires that an offender be sentenced under the laws in effect at the time he committed the offense for which he is being sentenced." *State v. Newton*, 200 Ariz. 1, ¶ 3, 21 P.3d 387, 388 (2001); *see also* A.R.S. § 1-246 (notwithstanding subsequent statutory amendment, "offender shall be punished under the law in force when the offense was committed"); 1993 Ariz. Sess. Laws, ch. 255, §§ 7-8, 99 (revised sentencing statutes "apply only to persons who commit a felony offense after the effective date of this act"); *State v. Stine*, 184 Ariz. 1, 3, 906 P.2d 58, 60 (App. 1995) ("[P]ersons convicted of crimes in Arizona generally do not benefit from subsequent changes of the statutory sentencing provisions.").

¶8 Similarly, the cases Haggard cites do not support his assertion that, because of a significant change in the law, his convictions or consecutive sentences for two separate crimes, arising from different facts but committed close in time, were impermissible. In his filings here and below, Haggard has referred generally to "Gonzalez versus the state," "AZ versus Ortega," and "the Mendoza case" as support for his assertion that he was impermissibly charged with "multiple counts for the same crime."[1] In *State v. Gonzalez*, 216 Ariz. 11, ¶ 8, 162 P.3d 650, 652 (App. 2007), we ruled only that the offense of attempted sexual conduct with a minor under the age of twelve had not been identified as a dangerous crime against children in the sentencing statute then in effect; that case has no relevance here. In *State v. Ortega*, 220 Ariz. 320, ¶¶ 25-28, 206 P.3d 769, 777-78 (App. 2008), we concluded a defendant's convictions for both molestation and sexual conduct with a minor under the age of fifteen, based on the same single act, were impermissible under double jeopardy principles. Here, Haggard does not dispute that his convictions, in contrast, were based on two separate acts. And, although Haggard relies on *Oregon v. Ice*, 555 U.S. 160, 129 S. Ct. 711 (2009), to argue a recent change in the law has rendered the court's imposition of consecutive sentences unconstitutional, that case does not support such a conclusion. Rather, in *Ice*, the Supreme Court held only that the Sixth Amendment is not violated when judges, rather

[1]In lieu of a table of authorities with complete case citations, Haggard states that, as an inmate at the Arizona Department of Corrections, he has no access to a law library or legal materials.

than juries, find predicate facts required by state law to impose a consecutive sentence. 555 U.S. at ___, 129 S. Ct. at 718.[2]

¶9 Having granted review, we conclude the trial court correctly found Haggard's post-conviction claims are precluded. Accordingly, we deny relief.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Judge

[2]In contrast to our review of *Gonzalez*, *Ortega*, and *Ice*, we have been unable to intuit Haggard's reference to "the Mendoza case." We have found no reported Arizona decision by that name that is relevant, even tangentially, to the issues Haggard raises.